Lim Gim Seah v Lokman bin Talib & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-04–248 OF 2008
AHMAD MAAROP FCJ, ABDUL MALIK ISHAK AND ANANTHAM KASINATHER JJCA
26 JANUARY 2012

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Civil Procedure — Pleadings — Failure to plead — Whether appellant bound by his pleadings — Whether alternative issue part of appellant's pleaded case

D

Tort — Negligence — Road accident — Road accident caused by works on highway — Vicarious liability — Sessions court found persons present at scene of accident ie first and second respondents 70% negligent for accident — Whether second respondent's 70% negligence should be equally borne by third respondent who employed second respondent — Whether third respondent was in control of site — Whether test varied when works undertaken on highway — Whether second respondent independent contractor — Whether third respondent excluded from liability for acts of second respondent

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Time Telecommunications Sdn Bhd ('TSB') was awarded a contract to undertake construction work ('the project') on that stretch of the road along Jalan Kanchut in Alor Setar ('the site'). TSB had in turn awarded a part of the project to the third respondent. The second and third respondent entered into a contract ('the contract') whereby the third respondent, contractor, appointed the second respondent to be its subcontractor. When the appellant met with an accident while he was riding his bicycle along the site, the only persons at the site were the employees of the second respondent and its supervisor, the first respondent. The appellant commenced an action against the first respondent, the superintending officer ('the SO') of the project at the site, and also the second and third respondents on the grounds that the first respondent was the servant or agent of the second or third respondents. The sessions court judge held the first and second respondents to be 70% negligent for the accident with the appellant having contributed to the negligence by 30% but did not find any negligence on the part of the third respondent. The appellant's appeal to the High Court was dismissed. This was the appellant's appeal against that decision. It was the appellant's argument that liability for negligence for works undertaken in the highway was imputed to the person 'in control' of the work site and as the first respondent was an employee of the third respondent, under the terms of the contract, the third respondent was in control of the site at the material time. Thus, in this appeal the appellant argued that the second respondent's 70% negligence should be equally borne by the third respondent.

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Alternatively, the appellant submitted that even if the second respondent was an independent contractor at the time of the accident, the third respondent was liable for the negligence of the second respondent because it had undertaken work in the highway. In reply the respondents' submitted that the test to determine whether the third defendant was vicariously liable for the acts or omissions of the second respondent depended entirely on whether the second respondent was an independent contractor and that on the facts of this case, the second respondent was an independent contractor.

Held, dismissing the appeal and ordering the appellant to pay the third respondent costs of RM15,000:

(1) It was the appellant's pleaded case that the first respondent was the servant or agent of the second or third respondents and the appellant relied on this fact alone to impose vicarious liability on the third respondent. However, from the evidence before the court it was established that the first respondent was the employee of the second respondent. Thus, the appellant could not complain when the sessions court and High Court could not find the third respondent vicariously liable for the acts of the first respondent. Further, from a plain reading of cl 16 of the contract between the second and third respondents it was clear that the site was deemed to be in the control of the second respondent until the superintending officer ('SO') issued a taking over order. This also explained why the second respondent was obliged, pursuant to cl 18 of the contract, to indemnify the third respondent for any damage caused to persons or property whilst carrying out the works. Accordingly, on this ground alone the High Court was right to dismiss the appeal from the sessions court (see para 13).

(2) This court did not agree with the appellant's argument that the test to determine whether a wrongdoer was a servant or agent independent contractor varied depending on whether the works were being undertaken in the highway or elsewhere. Instead, this court found that the third respondent was not vicariously responsible for the negligence of the second respondent, independent contractor (see para 14).

(3) The appellant's alternative issue that the third respondent was liable for the negligence of the second respondent because it had undertaken work in the highway, revolved around whether the appellant could bring his case within any one of those cases within the exception to the general rule. It was the view of this court that the instant appeal did not fall within the exceptions. Even if this view were wrong, this court held that this appeal had to fail since this issue did not form part of the appellant's pleaded case. The appellant had also not adduced any evidence that the nature of the work undertaken by the third respondent had resulted in

the creation of a direct duty of care owed by the third respondent to the appellant. Accordingly this appeal failed on this issue as well (see paras 16–19).

[Bahasa Malaysia summary

Time Telecommunications Sdn Bhd ('TSB') telah diawardkan kontrak untuk menjalankan kerja pembinaan ('projek') sepanjang Jalan Kanchut di Alor Setar ('tapak'). TSB kemudian telah mengawardkan sebahagian daripada projek tersebut kepada responden ketiga. Responden kedua dan ketiga telah memasuki kontrak ('kontrak tersebut') di mana responden ketiga, kontraktor, telah melantik responden kedua menjadi subkontraktornya. Apabila perayu mengalami kemalangan semasa sedang berkayuh basikalnya di sepanjang tapak tersebut, mereka yang berada di tapak tersebut hanyalah pekerja-pekerja responden dan penyelianya, responden pertama. Perayu telah memulakan tindakan terhadap responden pertama, pegawai pengawal ('PP') projek tapak tersebut, dan juga responden-responden kedua dan ketiga atas alasan bahawa responden pertama adalah pekerja atau ejen kepada responden kedua atau ketiga. Hakim mahkamah sesyen memutuskan bahawa responden-responden pertama dan kedua didapati cuai 70% dalam kemalangan itu manakala perayu menyumbang 30% daripada kecuaian tersebut tetapi tidak mendapati apa-apa kecuaian di pihak responden ketiga. Rayuan perayu ke Mahkamah Tinggi adalah ditolak. Ini adalah rayuan perayu terhadap keputusan tersebut. Adalah hujah perayu bahawa liabiliti kerana kecuaian untuk kerja-kerja yang dijalankan di jalan raya terletak pada yang mengawal tapak kerja tersebut dan oleh kerana responden pertama adalah pekerja kepada responden ketiga, di bawah terma-terma kontrak, responden ketiga mempunyai kawalan tapak tersebut pada masa matan. Oleh itu, dalam rayuan ini perayu berhujah bahawa kecuaian 70% responden kedua patut ditanggung bersama oleh responden ketiga. Secara alternatif, perayu berhujah bahawa meskipun responden kedua kontraktor bebas pada masa kemalangan, responden ketiga bertanggungjawab kerana kecuaian responden kedua kerana ia telah melaksanakan kerja tersebut di jalan raya itu. Sebagai jawapan responden-responden berhujah bahawa ujian untuk menentukan sama ada defendan ketiga adalah bertanggungjawab secara vikarius untuk tindakan atau peninggalan responden kedua bergantung sepenuhnya kepada sama ada responden kedua adalah kontraktor bebas dan bahawa berdasarkan fakta kes ini, responden kedua adalah kontraktor bebas.

Diputuskan, menolak rayuan dan memerintahkan perayu membayar responden ketiga kos sejumlah RM15,000:

(1) Ini adalah kes yang diplid perayu bahawa responden pertama adalah pekerja atau ejen responden-responden kedua atau ketiga dan perayu bergantung kepada fakta ini sahaja untuk meletakkan tanggungjawab vikarius ke atas responden ketiga. Walau bagaimanapun, berdasarkan keterangan di hadapan mahkamah adalah dibuktikan bahawa responden

pertama merupakan pekerja responden kedua. Oleh itu, perayu tidak boleh mengadu apabila mahkamah sesyen atau Mahkamah Tinggi tidak mendapati responden ketiga bertanggungjawab secara vikarius kerana tindakan responden pertama. Selanjutnya, berdasarkan bacaan biasa fasal 16 kontrak antara responden kedua dan ketiga adalah jelas bahawa responden kedua dianggap mempunyai kawalan ke atas tapak tersebut sehingga pegawai pengawal ('PP') mengeluarkan perintah pengambilalihan. Ini juga menjelaskan kenapa responden kedua bertanggungjawab, menurut fasal 18 kontrak, untuk menanggung rugi responden ketiga untuk apa-apa kerugian yang disebabkan ke atas mereka atau harta semasa menjalankan kerja tersebut. Sewajarnya, atas alasan ini sahaja Mahkamah Tinggi membuat tindakan yang betul untuk menolak rayuan dari mahkamah sesyen tersebut (lihat perenggan 13).

(2) Mahkamah ini tidak bersetuju dengan hujah perayu bahawa ujian untuk menentukan sama ada pesalah laku seorang pekerja atau ejen kontraktor bebas adalah berbeza bergantung kepada sama ada kerja-kerja dilaksanakan di jalan raya itu atau di tempat lain. Sebaliknya, mahkamah ini mendapati responden ketiga tidak bertanggungjawab secara vikarius kerana kecuaian responden kedua, kontraktor bebas (lihat perenggan 14).

(3) Isu alternatif responden ketiga bertanggungjawab untuk kecuaian responden kedua kerana ia patut melaksanakan kerja di jalan raya, berkisarkan sama ada perayu boleh menjadikan kesnya terangkum di bawah mana-mana satu pengecualian kepada rukun am. Adalah pendapat mahkamah bahawa rayuan ini gagal kerana isu ini tidak membentuk sebahagian daripada kes yang diplid perayu. Perayu juga tidak mengemukakan apa-apa keterangan bahawa sifat kerja yang dilaksanakan oleh responden ketiga telah membentuk kewajipan secara langsung terhadap responden ketiga kepada perayu. Oleh demikian rayuan ini gagal berhubung isu ini juga (lihat perenggan 16–19).]

Notes

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1480–1762.

Cases referred to

Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor [1993] 2 MLJ 234, SC (refd)

Holliday v National Telephone Co [1899] 2 QB 392, CA (distd)

Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers Ltd [1934] 1 KB 191, CA (refd)

Salsbury v Woodland and others [1970] 1 QB 324, CA (folld)

Walsh v Holst & Co Ltd [1958] 1 WLR 800, CA (refd)

Appeal from: Civil Appeal No 12–21 of 2005 (High Court, Alor Setar)

Brijnandan Singh Bhar (Brijnandan Singh Bhar & Co) for the appellant.
K Sivabalan (Shahrizat Rashid & Lee) for the respondent.

Anantham Kasinather JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] From the evidence before the court it appears that Time Telecommunications Sdn Bhd awarded a contract to undertake the construction of manholes, laying of ducts and other related works to the third respondent ('the project'). The third respondent awarded that part of the project involving the installation of fibre optic cables below the highway to the second respondent ('the works'). The works undertaken by the second respondent included undertaking the works along Jalan Kanchut in Alor Setar ('the site'). The terms of the contract between the second and third respondents can be found from pp 5–354 of the third respondent's core bundle of documents Vol 1.

[2] According to the unchallenged evidence of Encik Ghazali bin Mohamad Noor ('SP3'), JKR is responsible for the maintainance of the site. It is his evidence that a permit had been granted to Time Telecommunications Sdn Bhd to undertake the said project commencing July 1995 (see p 472 of the third respondent's core bundle Vol 2). It is therefore reasonable to conclude that the owner of the site is JKR, the employer of the project is Time Telecommunications Sdn Bhd, the third respondent is the contractor and the second respondent the subcontractor in respect of the works being conducted at the site.

[3] On 13 June 1995 at about 2.30am the plaintiff was riding motorcycle No KT 2268 along Jalan Kanchut in Alor Setar and in the direction of Anak Bukit in Alor Setar when he fell into a hole in the site and as a result of which he was injured. According to the investigating officer, the workers at the site when he visited the site shortly after the accident were employees of the second respondent and he interviewed the first respondent in his capacity as the supervisor of the second respondent (see the evidence of SP2 at p 465 of core bundle). It is the appellant's pleaded case that the first respondent was the servant/agent of either the second or third respondents when acting as the supervisor of the project. Hence, the inclusion of the third respondent as a defendant in this suit. However, it is not in dispute that the superintending

officer ('SO') under the contract between the second and third respondents was one Encik Shamsul Anuar bin Mohd Don ('SD1') an employee of the third respondent.

[4] On the conclusion of the trial the learned sessions court judge held the first and second respondents to be 70% negligent and the appellant to be 30% contributory negligent for the accident. The learned sessions court judge did not find any negligence on the part of the third respondent. The appeal by the appellant against the whole of the said decision of the learned sessions court judge was dismissed by the High Court on 24 January 2008.

ISSUES

[5] The two issues raised in this appeal are first, whether the second respondent's 70% negligence should be equally borne by the third respondent. Secondly, whether the third respondent is strictly liable for the negligence of the second respondent under the principles of law pronounced by the English Court of Appeal in the case of *Holliday v National Telephone Co* [1899] 2 QB 392.

[6] On the first issue counsel for the appellant submitted that, in law, liability for negligence for works undertaken in the highway is imputed to the person 'in control' of the work site and not determined by any categorisation of whether that person is a contractor or subcontractor. Counsel for the appellant then contended that to the extent the third respondent was 'in control' of the site, the learned sessions court judge ought to have made a finding that the third respondent was contributory negligent together with the second respondent (see the submission of counsel for the appellant before the High Court at p 3 of Vol 11). The basis for counsel submission was that the learned judges of the sessions and High Court had erroneously relied on cll 16 and 18 of the contract in determining who was in control of the site when, according to counsel the relevant clauses were cll 2.1, 2.2, 2.3, 2.5, 4.4, 13 and 15.2. Learned counsel for the respondent on the other hand contended that apart from cll 16 and 18, the lower courts decision can also be justified by reference to cll 30.1, 30.5 and 35.1.

[7] The relevant clauses read as follows:

Clause 2.1

Duties and Powers of S.O

The S.O shall be the representative and agent of the Contractor in carrying out any and all of his duties (including without limitation thereto the issue of any

certificate) under the contract and shall act solely on behalf of the Contractor, and shall not have any independent role whatsoever.

Clause 2.2

The S.O's duties are to watch and supervise the works, to test and examine any materials to be used, for workmanship employed in connection with the works, to issue instructions to the sub-contractor and to be the on-site representative of the contractor.

Clause 2.3

The S.O may appoint any number of persons to assist the S.O in the exercise of his functions. The names and functions of such persons shall be notified to the sub-contractor. The said assistants shall have no power to issue any instructions to the sub-contractor save insofar as such instructions may be necessary to enable them to discharge their functions in accordance with this contract. Any instructions given by any such assistants shall be deemed to have been given by the S.O.

Clause 2.5

If the Sub-Contractor shall be dissatisfied by reason of any act of any assistant of the S.O or other person duly authorized by the S.O under sub-clause 2.4 above, he shall be entitled to refer the matter to the S.O for his decision.

Clause 4.4

The Sub-Contractor shall provide sufficient superintendence whether on the site or elsewhere to ensure that the work to be carried out by a sub-contractor or supplier will comply with the requirements of the contract. The S.O may, by written notification order that the sub-contractor terminate the sub-contract or supply contract as the case may be, of any sub-contractor or supplier and the sub-contractor shall, at his own expense, within 21 days after the receipt of such notification so terminate such sub-contract or supply contract.

Clause 13

Work to satisfaction of S.O

Work to be to the satisfaction of the S.O

Save insofar as it is legally possible the Sub-Contractor shall execute the works in strict accordance with the Contract to the

satisfaction of the S.O and shall comply with (but without any prejudice to the Sub-Contractor's obligations hereunder) and adhere strictly to the S.O's instructions and directions on any matter (whether mentioned in the Contract or not).

Clause 15.2

The S.O shall be at liberty to object to and require the Sub-Contractor to remove forthwith from the works at the Sub-Contractor's expense any person employed by the Sub-Contractor or his sub-contractors in or about the execution of the Works and such person shall not be employed again upon the Works without the written permission of the S.O. The S.O shall not be required to justify his reasons for requiring a person to be removed from the Works. Any person so removed from the Works shall be replaced at the Sub-Contractor's expense as soon as possible by a competent substitute approved by the S.O.

Clause 16.1

Care of Works

From the commencement of the Works until the date stated in the Taking Over Certificate for the whole of the works issued pursuant to Clause 35 (Taking Over), the Sub-Contractor shall take full responsibility for the care thereof. Provided that if the S.O shall issue a Taking Over Certificate in respect of any Section, the Sub-Contractor shall cease to be liable for the care of that Section from the date stated in the Taking Over Certificate in respect of that Section and the responsibility for the care of that Section shall pass to the contractor. Provided further that the Sub-Contractor shall take full responsibility for the care of any outstanding work which he shall have undertaken to carry out during the Defects Liability Period after taking over until such outstanding work is completed.

Clause 16.2

In case any damage, loss or injury shall happen to the Works or to any part thereof from any cause whatsoever (save and except the Excepted Risk) including any negligence or default of the Contractor his servants or agents while the Sub-Contractor shall be responsible for the care thereof, the Sub-Contractor shall at his own expense repair and make good the same so that at completion the works shall be in good order and condition and

in conformity in every respect with the requirements of the Contract and the S.O's instructions. In the event of any such damage, loss or injury happening from any of the Excepted Risks, the Sub-Contractor shall, if and to the extent required by the S.O. repair and make good the same as aforesaid and the additional Costs of so doing shall be added to the Contract Sum subject to and in accordance with Clause 47 (Claims). The Sub-Contractor shall also be liable for any damage to the Works occasioned by him in the course of any operations carried out by him for the purpose of completing any outstanding work or complying with his obligations under clause 31 (Defects Liability Period).

Clause 18.1

Indemnity for negligent acts and for Personal Injury

The Sub-Contractor shall be liable for and shall indemnify the Employer and the Contractor against any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of, in the course of or caused by the carrying out of the Works, unless and to the extent that the same is due to any act or neglect of the Contractor.

Clause 18.2

The Sub-Contractor shall be liable for, and shall indemnify the Employer and the Contractor against, any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal insofar as such injury or damage arises out of or in the course of or by reason of the carrying out of the works and provided always and to the extent that the same is due to any negligence, omission, default or act of the Sub-Contractor his servants or agents.

Clause 30.1

Tests on Completion

The Sub-Contractor shall give to the S.O in writing 28 days prior notice of the date upon which he will be ready to make the Tests on completion. Unless otherwise agreed the tests shall take place within 28 days after the said date on such day or days as the S.O shall in writing notify the sub-contractor.

Clause 30.5

If the works or any section shall fail to pass the tests, such tests shall if required by S.O or by the sub-contractor be repeated within a reasonable time upon the same terms and conditions save that any expense to which the S.O may be put by the repetition of the tests shall be ascertained by the contractor and deducted from the contract sum.

Clause 35.1

Taking Over

As soon as the whole of the works or any section have been completed in accordance with the contract (except in minor respects that do not affect their use for the purpose for which they are intended and save for the obligations of the sub-contractor under clause 31 (defects Liability Period) and have passed the tests on completion, the S.O shall issue a taking over certificate in which he shall certify the date on which the works or any section as the case may be have been so completed and have passed the tests on completion and the contractor shall be deemed to have taken over the works or any section on the date so certified but the issue of a taking over certificate shall not operate as an admission that the works or any section have been completed in every respect.

[8] According to counsel for the appellant it is evident from a reading of cll 2.1, 2.2, 2.3, 2.5, 4.4, 13 and 15.2 that the second respondent was at the material time undertaking work in accordance with the instructions of the SO and to the extent that the SO was an employee of the third respondent under the terms of the contract, the third respondent can be said to be in control of the site at the material time.

[9] Learned counsel for the respondent, on the other hand, submitted that the test to determine whether the third defendant was vicariously liable for the acts/omission of the second respondent depended entirely on whether the second respondent was an independent contractor. According to him, this test is the one set out by Lord Slesser LJ in the case of *Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers Ltd* [1934] 1 KB 191. His Lordship summarised the test in this manner:

> The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor.

(See p 196 of the report.)

[10] Counsel for the respondent also submitted that it is evident from cll 16, 30.1, 30.5 and 35.1 that the second respondent was in full control of the site and the works during the period of the contract as the contract involved the specialised task of installing fibre optic cables below the highway. Furthermore, the third respondent could only recover possession of the site upon the issuance of a certificate by the SO and which certificate could only be issued after the successful completion of various tests to be conducted by the SO. In other words, according to counsel for the respondent, on the facts of this case, the third respondent only prescribed the work to be undertaken whilst leaving the manner of doing it entirely in the hands of the second respondent so as to render the second respondent to be an independent contractor, applying the test propounded by Justice Slesser. This, according to counsel for the respondent, explains why the only persons at the site at the time of the accident were the employees of the second respondent and its supervisor, the first respondent (see the evidence of SP2 at p 465 of the core bundle).

[11] As regards the second issue it was the submission of counsel for the appellant that the main contractor may be liable in negligence even though work was being undertaken by an independent contractor at the time of the accident. For this proposition, counsel for the appellant invited us to have regard to the following passages in the judgments of Earl of Halsbury LC and AL Smith LJ in the case of *Holliday v National Telephone Co* Earl of Halsbury LC opined to this effect:

> There was clearly evidence to the effect that work, in the course of which the accident happened, was being done, not by the person whom the defendants call an independent contractor alone, but by that person and the defendants jointly; and I think the evidence justified the view that they were both engaged in the joint operation under such circumstances that both of them would be responsible if there were negligence in the performance of it such as that which occasioned the accident in this case. There is a further ground for holding that the plaintiff is entitled to succeed. There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorised by the proper authority. The telephone company so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works.
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> If the lamp were in good order, the operation would be harmless; but, if the safety-valve of the lamp were out of order, an explosion must ensue. Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation

to the public to take care that persons passing along the highway were not injured by the negligent performance of the work. For these reasons the appeal must be allowed.

(See pp 398–399 of the report.)

AL Smith LJ on his part opined:

The defendants were a telephone company who were engaged in the execution on a highway of works which were clearly dangerous. It obviously involves a certain amount of danger to have a caldron of molten lead on a highway. The defendants, therefore, on the hypothesis that Highmore was an independent contractor, were delegating to him the execution of dangerous work upon a highway. The deputy judge finds that in making the joints between the pipes it was a proper thing for the purpose of getting the necessary flare to dip the benzoline lamp into the molten metal. The safety-valve of the lamp being out of order, the result of doing that was that the lamp exploded, and the molten lead was scattered about, some falling on the plaintiff who was passing by upon the highway. The defence is that the defendants are not liable in respect of the injury sustained by the paintiff, because it was occasioned by the negligence of an independent contractor for whom they are not responsible. In my opinion, since the decision of the House of Lords in *Hughes v Percival* 8 App Cas 443 and that of the Privy Council in *Black v Christchurch Finance Co* [1894] AC 48, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore was engaged to perform.

(see pp 399–400 of the report.)

[12] Based on the aforesaid pronouncements, counsel for the appellant contended that where the independent contractor was undertaking work in the highway, the main contractor such as the third respondent is liable in negligence even if the second respondent was an independent contractor. according to counsel for the appellant, in such cases, the law extends the duty of care to include the main contractor since the duty imposed by law on the third respondent cannot be delegated to the second respondent. The rationale being that you cannot avoid liability merely by delegating the work to a third party. We were then referred to the following passage in the judgment of Slesser LJ:

As the Electricity Board had authorised work to be done adjoining the highway which might without due precautions cause injury to anyone on the highway, the authorities already cited by my Lords show that the board would be liable for the

negligence of the contractors or subcontractors in failing to take due precautions. Likewise, the contractors would be liable for any negligence in the performance of their duties delegated to subcontractors.

in the case of *Walsh v Holst & Co Ltd* [1958] 1 WLR 800 at p 812 in support of this proposition.

JUDGMENT OF THE COURT

First issue

[13] In our judgment, the learned sessions and high court judges cannot be faulted for determining the case based on cll 16 and 18 and without due regard to the remaining clauses in the contract between the second and third respondents. We opine to this effect because the appellant's pleaded case for contending that the third respondent was equally liable as the second respondent was premised on one fact only. This was that the first respondent was the employee and/or agent of the second and/or secord respondent (see paras 5 and 6 of the appellant's amended statement of claim at p 32 of Vol 111 (a)). In other words, in our judgment, the appellant having relied on this fact alone to impose vicarious liability on the third respondent cannot be heard to complain since the evidence before the court was that the first respondent was the employee of the second and not the third respondent. Furthermore, we agree with the learned sessions judge that it is evident from a plain reading of cl 16 of the contract that the site is deemed to be in the control of the second respondent until the issuance of the taking over order by the SO pursuant to cl 35 of the contract between the second and third respondents. In our opinion, this serves to explain why the second respondent is obliged to indemnify the third respondent for any damage to persons or property caused whilst carrying out the works, pursuant to cl 18. Accordingly, on this ground alone, the High Court was right to dismiss the appeal from the decision of the learned sessions judge.

[14] Be that as it may, since the two issues in this case were argued at length and the subject matter of lengthy submissions in writing, we propose to deal with these issues in this judgment. In our judgment, the decision of the High Court to dismiss the claim of the appellants against the third respondent on the first issue can also be justified on the following additional grounds. First, we do not agree with counsel for the appellant that the test to determine whether a wrongdoer is a servant or agent or independent contractor varies depending on whether the works are being undertaken in the highway or elsewhere. In our judgment, the test is the same as is evident from this passage in the leading judgment of Lord Justice Widgery in the case of *Salsbury v Woodland and others* [1970] 1 QB 324 at pp 336–337:

> It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think that it is entirely accepted that those cases — and there are some — in which an employer has been held liable for injury done by the negligence of an independent contractor are in truth cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf. The whole question here is whether the occupier is to be judged by the general rule, which would result in no liability, or whether he comes within one of the somewhat special exceptions -cases in which a direct duty to see that care is taken rests upon the employer throughout the operation. This is clear from authority; and for convenience I take from *Salmond on Torts*, (14th Ed), (1965), p 687, this statement of principle:
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> One thing can, however, be said with confidence: the mere fact that the work entrusted to the contractor is of a character which may cause damage to others unless precautions are taken is not sufficient to impose liability on the employer. There are few operations entrusted to an agent which are not capable, if due precautions are not observed, of being sources of danger and mischief to others; and if the principal was responsible for this reason alone, the distinction between servants and independent contractors would be practically eliminated from the law.

[15] For the reasons given earlier in this judgment, in our judgment, the appellant does not fall within the general rule for imposing vicarious liability on the main contractor such as the third respondent. In this respect, we adopt the rejection by LJ Widgery of the pronouncements of LJ Slesser set out in para 12 of this judgment. LJ Widgery in *Salsbury v Woodland and others* at p 340 had this to say on the pronouncements of LJ Slesser:

> But in my judgment, having considered this matter with such care as I can, I can find nothing in the authorities to which Slesser LJ referred which justifies a conclusion in the terms which he uses; and, as I have already said, this decision was obiter because the case turned on the absence of negligence and not upon any nice question of which of the defendant might have been liable if negligence had been proved.

Accordingly, the appeal fails on this ground as well. Thirdly, in our judgment, the fact that the SO appointed by the third respondent was entitled to give instructions to the second respondent can be easily explained away as being necessary since the works undertaken by the second respondent are complementary to the works undertaken by the third respondent as part of the project. This is evident from the contents of cl 16.2 which, inter alia, requires the second respondent to ensure that:

> the works shall be in good order and condition and in conformity in every respect with the requirements of the contract.

Accordingly, the SO's instructions are not intended to control the actual performance of the second respondent as much as to ensure that the works of the second respondent are in conformity with the project.

Second issue

[16] In our judgment, the answer to the second issue revolves around whether the appellant can bring his case within any of those cases which fall within the exception to the general rule. The Federal Court in the case of *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor (Peh Swee Chin SCJ)* [1993] 2 MLJ 234 acknowledged the two exceptions to the general rule to be those cited by the English Court of Appeal in *Salsbury v Woodland and others*. Lord Justice Widgery in this case cited the two exceptions to be:

> The first class concerns what have sometimes been described as 'extra-hazardous acts' — acts commissioned by an employer which are so hazardous in their character that the law has thought it proper to impose this direct obligation on the employer to see that care is taken. An example of such a case is *Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191. Other cases which one finds in the books are cases where the activity commissioned by the employer is the keeping of dangerous things within the rule is *Rylands v Fletcher* (1868) LR 3 HL 330 and where liability is not dependent on negligence at all.
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> The second class of case, which is relevant for consideration, concerns dangers created in a highway. There are a number of cases on this branch of the law, a good example of which is *Holliday v National Telephone Co* [1899] 2 QB 392. These, on analysis, will all be found to be cases where work was being done in a highway and was work of a character which would have been a nuisance unless authorised by statute. It will be found in all these cases that the statutory powers under which the employer commissioned the work were statutory powers which left upon the employer a duty to see that due care was taken in the carrying out of the work, for the protection of those who passed on the highway. In accordance with principle, an employer subject to such a direct and personal duty cannot excuse himself, if things go wrong, merely because the direct cause of the injury was the act of the independent contractor.
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> (see p 338 of the report.)

[17] As is apparent from the contents of para 11 of this judgment, it was contended with much force by counsel for the appellant that the facts in the instant appeal fall within the facts of the case of *Holliday v National Telephone Company*. To the extent that Lord Justice Widgery acknowledged the judgment of the court in *Holliday v National Telephone Company* as falling within the second class of cases, counsel for the appellant contended that it follows that the facts in the instant appeal fall within the exception to the general rule. With

respect, we are unable to agree with the submission of counsel for the appellant. First, the facts in the case of *Holliday v National Telephone Company* are materially different from the facts in the instant appeal. As acknowledged by Lord Halsbury LC, the facts in *Holliday v National Telephone Co* involved work being undertaken not just by the independent contractor alone but jointly by the independent contractor and the employer. This is evident from His Lordship's observation at p 398 of the reported judgment of the court that:

> I think the evidence justified the view that they were both engaged in the joint operation under such circumstances that both of them would be responsible if there were negligence in the performance of it such as that which occasion the accident in this case.

[18] Secondly, in *Holliday v National Telephone Com*, the work undertaken in the highway also included extra hazardous acts of the nature falling within the first class of cases cited by Lord Widgery in *Salsbury v Woodland and others*. This is evident from His Lordship's observation at p 399 of the reported judgment of the court that:

> In this case the work to be done was the soldering together of pipes, and for that operation it appears to have been necessary to have molten metal at hand for the purpose of being instantly applied, and it was, as the deputy judge finds, a common and proper practice, with which it may be assumed that the defendants were familiar as they themselves did part of the work, to dip a benzoline lamp into the caldron of molten metal for the purpose of getting a flare. If the lamp were in good order, the operation would be harmless; but, if the safety-valve of the lamp were out of order, an explosion must ensue. Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place.

[19] In our judgment, the facts in the instant appeal do not fall within either the first or second class of cases cited in the judgment of the court in *Salsbury v Woodland and others*. Even if we are wrong, in our opinion, this appeal must still fail since it is neither the appellant's pleaded case nor is there any evidence that the nature of the work undertaken by the third respondent resulted in the creation of a direct duty of care to the appellant on the third respondent. Accordingly, this appeal fails on the second issue as well.

We dismiss the appeal and order the appellant to pay costs of RM15,000 to the third respondent only. We order the deposit to be paid to the third respondent on account of the fixed costs.

Appeal dismissed and appellant ordered to pay third respondent costs of RM15,000.

Reported by Kohila Nesan